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Hate Speech and Freedom of Expression: Legal Boundaries in Canada

Publication No. 2018-25-E
29 June 2018

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Parliamentary Information and Research Service

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Hate Speech and Freedom of Expression: Legal Boundaries in Canada
(Background Paper)

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Ce document est également publié en français.

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HATE SPEECH AND FREEDOM OF EXPRESSION: LEGAL BOUNDARIES IN CANADA *

1 INTRODUCTION

Although Article 19 of the United Nations *Universal Declaration on Human Rights*[1] proclaims that everyone has the right to freedom of opinion and expression, many countries have laws that censor or limit certain types of expression, including speech that incites violence and hatred. Some free speech advocates prefer an open marketplace of ideas, where no expression is restricted. They consider that the best response to harmful speech is through debate that lets different ideas freely challenge it. Others argue that restrictions on hate speech are vital to the protection of minority communities from the harm that such speech causes.[2]

Different approaches to what is acceptable speech can be seen around the world. The United States of America has traditionally been a country where the constitutional protection of free speech is vigorously defended.[3] And yet, even there, many restrictions on free speech do exist, such as those against speech that incites "imminent lawless action"[4] and those that censor obscenity.[5]

Some countries show a greater acceptance than others for prohibiting certain forms of speech and even the expression of certain opinions. For instance, some European countries have passed laws in accordance with a European Union Council decision to make it a punishable offence not only to incite hatred, but also to publicly deny crimes of genocide (e.g., the Holocaust) or war crimes.[6] In other countries, strict limitations on free speech may go as far as to impose the death penalty for such crimes as apostasy, blasphemy or other statements that may be perceived to be opposed to the dominant religion.[7]

In Canada, various laws at the federal, provincial and territorial levels impose restrictions on the freedom of expression guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*.[8] For instance, under the *Criminal Code*,[9] such actions as defamatory libel, counselling suicide, perjury and fraud are prohibited. In 1990, then Justice of the Supreme Court of Canada Antonio Lamer described offences that address forms of speech or expression as falling under the following categories:

> offences against the public order, offences related to falsehood, offences against the person and reputation, offences against the administration of law and justice, and offences related to public morals and disorderly conduct.[10]

Among the laws that have restricted freedom of expression are those referred to as anti-hate laws, for their purpose is to restrict the publication and public expression of messages intended to incite hatred towards members of particular groups. In other words, they prohibit hate propaganda. The two main provisions addressing hate in Canada, sections 318 and 319 of the *Criminal Code*, impose criminal sanctions against anyone who wilfully promotes genocide or incites hatred in public.

Until 2013, when section 13 of the *Canadian Human Rights Act*[11] was repealed,[12] restrictions against communicating in a manner that could expose a person to hatred were included in that Act. Such restrictions are also found in some of Canada's provincial human rights laws.[13]

Most Canadian human rights laws prohibit publishing or displaying material that expresses an intention to discriminate, implies discrimination, or intends to incite others to discriminate.[14] The Supreme Court has recognized that eliminating the spread of hatred is part of the broader goal of addressing discrimination. In its review of the *Saskatchewan Human Rights Code* in *Saskatchewan (Human Rights Commission) v. Whatcott*, the Court stated that "prohibiting representations that are objectively seen to expose protected groups to 'hatred' is rationally connected to the objective of eliminating discrimination and the other harmful effects of hatred."[15]

Although it has found a number of Canada's anti–hate propaganda laws to be infringements of the right to free expression, the Supreme Court has determined that they are largely justifiable under the Charter and the reasonable limitations it permits on rights in Canada's free and democratic society. The Court has found that the harm caused by hate propaganda is not in keeping with the aspirations to freedom of expression or the values of equality and multiculturalism contained in sections 15 and 27 of the Charter.[16]

This paper explores the different types of restrictions that have been used in Canada to address the promotion of hatred and other related and potentially harmful forms of expression, such as the glorification of terrorism or the display of an intent to discriminate. It includes information on other ways in which crimes motivated by hatred are addressed in the criminal sentencing process and are tracked by law enforcement agencies. It also reviews some aspects of the debate surrounding ways to address hate propaganda.

2 FREEDOM OF EXPRESSION AND THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

With the inclusion of the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*, certain human rights and fundamental freedoms have an enhanced legal status. All laws in Canada must comply with the Charter and are interpreted by Canadian courts in a manner that is consistent with the supremacy of the Constitution.[17]

The freedoms of thought, belief, opinion and expression are protected as a fundamental constitutional guarantee in section 2(b) of the Charter. This section adds that these rights include "freedom of the press and other media of communication." Some who promote the right to freedom of expression have argued that this right plays an important role as an "instrument of democratic government," an "instrument of truth," or an "instrument of personal fulfilment."[18]

Freedom of speech is also declared to be a human right and fundamental freedom in the *Canadian Bill of Rights*.[19] This federal law sets out various rights, including freedom of religion and freedom of the press. Passed in 1960, it remains in force.

Though it does not form part of Canada's Constitution, it has been described by the Supreme Court as quasi-constitutional, and therefore other laws must be interpreted in ways that are consistent with it.[20]

The Supreme Court of Canada has recognized that the Charter's guarantee of freedom of expression is not absolute. It has upheld restrictions on forms of expression that it has deemed to run contrary to the spirit of the Charter, such as hate speech, given that the purpose of such expression is to prevent the free exercise of another group's rights.

Certain limitations may be placed on Charter guarantees. Section 1 of the Charter provides that all rights and freedoms guaranteed by the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This means that once an infringement of a Charter right has been established, the courts must decide whether the violation by the government or other institution to which the Charter applies can be considered justified.[21] To do this, the courts must use a balancing test to weigh the objectives and actions of the government or other institution against the interests of an individual claiming that a Charter right has been violated. Under section 52 of the *Constitution Act, 1982*, a law, or a part of it, may be found to be unconstitutional and struck down,[22] or the law may be found to be constitutional, and a person's Charter right may therefore be justifiably limited by it.

Various Canadian laws have accordingly placed restrictions on freedom of expression, whether as part of the law's intended purpose or as an indirect consequence. Perjury, counselling suicide, and creating child pornography are all forms of expression, but they have been limited through designation in the federal *Criminal Code* as criminal offences. Publishing election surveys on a federal general election day while polling stations are still open is prohibited.[23] This limits the freedom of the press in Canada but is intended to prevent voters from being unduly influenced by last-minute polls of voters' intentions.

The provincial and federal laws in Canada pertaining to defamation are another example of a limitation on free speech; these laws have been created to protect the reputations of individuals. In addition, as discussed below, the *Criminal Code* and provincial human rights laws contain prohibitions against the publication of messages that promote hatred. All of these examples demonstrate that freedom of expression in Canada can be limited to promote other values or goals that are considered to be of greater social importance.

3 *CRIMINAL CODE* PROVISIONS TARGETING HATE

3.1 HATE PROPAGANDA

Hate propaganda provisions were first added to the *Criminal Code* in 1970[24] in response to the recommendation of the Special Committee on Hate Propaganda in Canada that a law be established to prohibit advocating genocide and inciting hatred of particular groups, where these activities are likely to occasion breach of the peace.[25]

This special parliamentary committee, known as the "Cohen Committee," after its chairperson, Maxwell Cohen, was created following a series of events in the 1960s, when certain white supremacist and neo-Nazi groups, largely based in the United States, were active in Canada. These groups and individuals engaged mainly in anti-Semitic and anti-Black propagandizing. The committee emphasized the high esteem that should be placed on free expression in Canada, which it said in most cases should take precedence over any legal limitations that could be imposed on it.[26] However, the committee explained that such limitations are necessary when "liberty becomes licence and colours the quality of liberty itself with an unacceptable stain."[27]

The hate promotion offences and related provisions can be found in sections 318 to 320.1 of the *Criminal Code*[28] (these provisions are reproduced in the appendix to this paper). Prosecutions of the offences contained in these sections have been few, and there is consequently very little jurisprudence. Nevertheless, the relevant court decisions include some of the key judicial interpretations of section 2(b) of the Charter.[29]

Under section 318(1), everyone who advocates or promotes genocide is guilty of an offence punishable by up to five years' imprisonment. The term "genocide" is defined in section 318(2) to mean killing members of an identifiable group or deliberately inflicting on an identifiable group conditions of life calculated to bring about the group's physical destruction. An intent to directly prompt or provoke another person to commit genocide is enough to establish the *mens rea*, or criminal intent, component of the offence.[30]

Section 318(4) of the *Criminal Code* defines an "identifiable group" as any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.[31] No prosecution under section 318 can be undertaken without the consent of the relevant Attorney General[32] (which is intended to, among other things, provide some control of the charges that may proceed in particularly sensitive or controversial areas of criminal law).

Under section 319(1), everyone who, by communicating statements in a public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of an indictable offence punishable by up to two years' imprisonment, or of a summary conviction offence.

Section 319(2) makes it an offence to communicate, except in private conversation, statements that wilfully promote hatred against an "identifiable group" (which has the same meaning as in section 318). As with offences under section 318, no prosecution under section 319(2) can be instituted without the consent of the Attorney General.

Section 319(7) defines "communicating" to include communicating by telephone, broadcasting or other audible or visible means.[33] "Public place" is defined to include any place to which the public has access by right or by invitation, express or implied. "Statements" include words spoken or written or recorded electronically, electromagnetically or otherwise, and also include gestures, signs or other visible representations.

Some of the terms used in these provisions have been further defined by Canadian courts. In a 1990 decision, the Supreme Court said that "'hatred' connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation." It added:

> Hatred is predicated on destruction, and hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values of our society. Hatred in this sense is a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.[34]

The Ontario Court of Appeal has noted that the term "wilfully" does not include recklessness, but may include wilful blindness. In other words, accused persons must either have known that their actions would have the effect of promoting hatred, or at least have known or "strongly suspected" that inquiry on their part respecting the consequences of their acts would result in the "actual knowledge" required to satisfy the *mens rea* requirement for the offence.[35]

Any person charged under section 319(2) of the *Criminal Code* has available four special defences set out in section 319(3). These defences are that:

- the communicated statements are true;
- an opinion or argument was expressed in good faith and either concerned a religious subject or was based on a belief in a religious text;
- the statements were relevant to a subject of public interest and were on reasonable grounds believed to be true; and
- the statements were meant to point out matters that produce feelings of hatred toward an identifiable group and were made in good faith for the purpose of their removal.

The reverse onus on the accused persons to prove that their statements were true was found to be a justifiable limitation on the right to be presumed innocent under section 11(d) of the Charter.[36] These special defences are not available to those charged under sections 318 and 319(1) of the *Criminal Code*.

Sections 320 and 320.1 of the *Criminal Code* provide that a judge may, on reasonable grounds, issue an order for the confiscation of hate propaganda in any form, including data on a computer system. Hate propaganda is defined in section 320(8) as any writing, sign or visible representation advocating or promoting genocide, or the communication of which would be an offence under section 319. By implication, this material has to target identifiable groups. To be seized, material must simply be shown to be hate propaganda – it need not be shown to be dangerous. The consent of the Attorney General is required before these seizure and confiscation provisions can be used.

3.2 The Glorification of Terrorism

In 2015, with the passage of Bill C-51 (*Anti-terrorism Act, 2015*), a section was added to the *Criminal Code* to create a new offence of advocating or promoting the commission of terrorism offences, otherwise referred to as the glorification of terrorism.[37] While distinct from the Code's hate propaganda provisions, the new offence uses similar language regarding wilful or reckless communications that seek to inspire certain negative behaviour in others.

New section 83.221 of the *Criminal Code* prohibits any person from communicating statements or knowingly advocating or promoting the commission of terrorism offences in general when that person has knowledge that any of those offences will be committed – or is reckless as to whether the offences will be committed – as a result of their communication. The consent of the Attorney General is not required to prosecute an offence under this section.

Section 83.221 creates an exception that appears to protect a person who advocates or promotes only the offence of advocating or promoting the commission of terrorism offences. While the wording of this exception leaves open some debate about its meaning, it is possible that it could protect the free speech of those who may wish to challenge the law or any aspect of it.

New section 83.222 covers matters pertaining to the seizure and forfeiture of terrorist propaganda. As with the seizure of hate propaganda, consent of the Attorney General is required before any seizure proceedings under this section can be started.

3.3 Crimes Motivated by Hatred

Another key provision in the *Criminal Code* that addresses crimes motivated by hatred is found in section 718.2(a)(i), which sets out various principles of sentencing. The section allows for increased penalties when an offender is sentenced for any criminal offence if there is

> evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor.

In other words, judges have the ability to impose higher sentences where a crime was motivated by hatred.

Statistics Canada collects information concerning police-reported criminal incidents that were confirmed or strongly suspected to be motivated by hate based on the factors listed in section 718.2(a)(i) (information concerning criminal incidents involving gender identity and expression was not reported on prior to 2018, because these factors were added to the Code in 2017[38]). As the information is compiled by police departments, the data does not reflect findings in the court system of guilt for crimes motivated by hate. The data is presented annually, allowing for a public monitoring of trends in hate crimes across Canadian metropolitan areas. For instance,

in 2016, "police reported 1,409 criminal incidents in Canada that were motivated by hate, an increase of 3% or 47 more incidents than reported the previous year."[39]

Police-reported hate crimes include a broader range of offences than those outlined in sections 318 and 319 of the Code. They include violent crimes motivated by hate, such as common assault, aggravated assault, assault with a weapon or causing bodily harm, and uttering threats. From 2015 to 2016, the number of violent hate crimes rose from 487 to 563 (an increase of 16%). In 2016, the various assault offences accounted for 20% of all hate crimes, and uttering threats accounted for 13%. Mischief, which includes vandalism and graffiti, accounted for 39% of hate crimes.[40]

Another offence tracked by Statistics Canada is set out in section 430(4.1) of the *Criminal Code*, which prohibits mischief in relation to religious property and property that is used for educational purposes, for administrative, social, cultural or sports activities or events (such as a school or a community centre) or as a residence for seniors, where the mischief is motivated by bias, prejudice or hate based on colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability. More generally, the offence of mischief is the act of wilfully destroying, damaging, rendering dangerous, useless, inoperative or ineffective, or obstructing the lawful use or enjoyment of property.[41]

3.4 Other Legal Restrictions Concerning Hatred

Different forms of hate speech are prohibited in a number of federal enactments. For instance, section 8 of the *Broadcasting Distribution Regulations* prohibits the broadcasting of

> any abusive comment or abusive pictorial representation that, when taken in context, tends to or is likely to expose an individual or group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability.[42]

Similar provisions are contained in other regulations made under the *Broadcasting Act*.[43] Also, the *Customs Tariff* prohibits the importation of hate propaganda.[44]

4 ANTI-HATE PROVISIONS IN HUMAN RIGHTS LEGISLATION

4.1 Canadian Human Rights Laws, Discrimination and Hate Speech

Human rights laws, with their broad goal of eliminating discrimination against identifiable groups, can serve to address expressions of hatred and contempt and any expression that displays an intention to discriminate or to incite others to discriminate. Whether these laws should include prohibitions on hate speech and hate propaganda has been a matter of debate for some time, and Canadian jurisdictions have responded with different approaches in their laws.

As "human rights" are not listed under the enumerated heads of power in sections 91 and 92 of the *Constitution Act, 1867* (which set out the division of powers between the federal and provincial governments), laws that address human rights concerns have been passed at the federal, provincial and territorial levels to respond to various matters within those jurisdictions.[45] Although there is some diversity among human rights laws in Canada, the principles, the complaint mechanisms, and the tribunals created to hear complaints and order remedies (where appropriate) are similar. Each statute prohibits discrimination on specified grounds, such as race, sex, age or religion, and in the context of employment, accommodation and publicly available services.

Every legislature in Canada has passed a human rights law to prohibit or limit discriminatory activities.[46] The *Canadian Human Rights Act* (CHRA) is the principal human rights statute in the federal sector.[47] It applies generally to federal government departments and agencies, Crown corporations and federally regulated businesses.[48] It prohibits an employer or service provider under federal jurisdiction from carrying out discriminatory practices based on certain prohibited grounds: race, national or ethnic origin, colour, religion, age, sex (including pregnancy and childbirth), sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability (including previous or present drug or alcohol dependence), and pardoned conviction.

With the exception of Yukon's *Human Rights Act*,[49] every human rights law in Canada contains a provision that prohibits in some form the public display, broadcast or publication of messages that announce an intention to discriminate, or that incite others to discriminate, based on certain prohibited grounds.[50] Section 12 of the CHRA contains such a provision. The original purpose of these provisions was to prohibit the types of signs that had been used in Canada by some stores and businesses indicating that the members of certain racial or ethnic groups would not be served.[51] The Ontario Human Rights Commission notes that these provisions

> allow human rights agencies to use enforcement powers to deal with the publication of intent to deny housing, employment or services such as access to a restaurant or retail store because of an individual's race, religion or other enumerated ground.[52]

While these provisions place limits on freedom of expression, they have received little attention by commentators or in Canadian courts.

Human rights legislation in British Columbia, Alberta, Saskatchewan and the Northwest Territories contains some form of prohibition against the promotion of hatred or contempt.[53] These prohibitions are broad, covering a range of message types, displays, publications and broadcasts.

In the Alberta, Saskatchewan, Ontario, New Brunswick, Prince Edward Island and Newfoundland and Labrador human rights laws, there are sections that explicitly state that there is "nothing" in them that should interfere with or restrict the right to free expression. Some of these sections pertain to anti-hate promotion provisions, while others pertain to those provisions that prohibit forms of communications that announce an intention to discriminate. Courts have emphasized that such references to freedom of expression in the Alberta and Saskatchewan human rights laws require

that a balancing act be performed between the objective of eradicating discrimination and the need to protect free expression.[54]

The existing court and human rights tribunal interpretations of Canada's anti-discrimination and anti-hate promotion provisions reveal that the provisions in different jurisdictions largely achieve similar purposes, despite using different language.[55] Though the facts of every case differ, an emphasis on examining the context of a message and the importance of freedom of expression has been fairly well established in the jurisprudence. Where the laws – and the interpretations of them – differ is in the types of messages and discriminatory practices that are affected, whether the laws address hatred and contempt, and whether the laws require that consideration be given to the intent of the message's author.

4.2 Former Section 13 of the *Canadian Human Rights Act*

Until it was repealed in 2013, section 13 of the CHRA addressed the promotion of hatred, and some of the key cases examining anti-hate legislation in Canada pertained to constitutional challenges of that section. The debates concerning whether to retain, reform or repeal section 13 revealed the challenges inherent in striking a balance between free speech and the protection of vulnerable groups.

Former section 13 of the CHRA did not specifically prohibit hate messages; rather, it made it a discriminatory practice to

> communicate telephonically or to cause to be so communicated … by means of the facilities of a telecommunication undertaking … any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

This part of the CHRA was first used against the dissemination of hate promotion messages by telephone services,[56] though subsection 13(2) was added in 2001 to clarify that subsection 13(1) applied to communications sent over computers, "including the Internet, or any similar means of communication, but does not apply in respect of a matter that is communicated in whole or in part by means of the facilities of a broadcasting undertaking." Section 13 did not apply to printed publications, unless a print article was posted on an Internet site.

Former section 13 served as an alternative but complementary approach for dealing with hate promotion to that provided for by the *Criminal Code*, which, in providing a criminal sanction, was intended to be used in response to more egregious hate promotion. They differed in several key ways. The most obvious is the Code's criminal sanction against the promotion of hatred or the advocating of genocide. In addition, the Code provisions, unlike section 13, do not restrict the specific types of communications to which they apply; include the requirement that the Attorney General consent to the prosecution of a complaint (anyone could bring a complaint under former section 13 of the CHRA); contain defences for the respondent to a complaint; and require that a complainant show evidence of specific intent or wilfulness on the part of the respondent.

In January 2008, an unsuccessful private member's motion calling on Parliament to repeal section 13 was introduced in the House of Commons.[57] Later, in 2011, a

private member's bill to repeal section 13 was introduced in the House of Commons; Bill C-304, An Act to amend the Canadian Human Rights Act (protecting freedom), received Royal Assent on 26 June 2013.[58]

5 THE CONSTITUTIONALITY OF ANTI-HATE PROVISIONS

Canadian courts and human rights tribunals have examined the constitutionality of the hate propaganda provisions in the *Criminal Code*, of former section 13 of the CHRA, and of the anti-hate provisions found in the *Saskatchewan Human Rights Code*. The Supreme Court of Canada and the Canadian Human Rights Tribunal (CHRT) have held that although these laws infringe the right to free expression granted in section 2(b) of the Charter, they are reasonable and justifiable limits on this right.

5.1 *Keegstra* Decision

The key court decision regarding the hate propaganda provisions of the *Criminal Code* is *R. v. Keegstra*. This case involved an Alberta high school teacher who was charged under section 319(2) of the Code for communicating anti-Semitic statements to his students. A slim majority of four of the seven sitting judges of the Supreme Court confirmed in 1990 that section 319(2) is constitutional. In his written decision, former Chief Justice Brian Dickson considered that Parliament had recognized the "substantial harm" that hate propaganda can cause to targeted groups and Canadian society and noted that section 319(2) was intended to prevent this harm. He also examined evidence and concluded that "Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred."[59]

His majority opinion also noted that Parliament's approach was proportional and included various safeguards to minimally impair free expression (such as the requirement that the Attorney General consent to commencing criminal proceedings). It also engaged in more philosophical arguments over the nature of free expression, explaining that hate propaganda contributes little to the aspirational "quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged."[60]

In her dissenting opinion, then Justice Beverley McLachlin concluded that section 319(2) does not interfere as little as possible with freedom of expression, arguing, among other things, that hatred is too broad a term, one that could catch "non-nefarious" statements and precipitate a "chilling effect on legitimate activities."[61] The minority opinion also considered that the severity of criminal prohibition was "unnecessary," given that alternative, effective and more appropriate remedies were available (through the CHRA, as this was prior to the repeal of section 13 of that Act).

5.2 *Taylor*, *Zundel* and *Lemire* Decisions

The key Supreme Court of Canada decision concerning the constitutionality of former section 13 of the CHRA, rendered in 1990, is *Canada (Human Rights Commission)*

v. Taylor. This case involved John Ross Taylor and the Western Guard Party, which at the time were operating a hate promotion telephone message service. Although section 13 was found to be inconsistent with section 2(b) of the Charter, the same judges who formed the majority in the *Keegstra* case held that it was saved under section 1 as a reasonable limit in a free and democratic society.

In his decision for the majority, former Chief Justice Dickson concluded again that hate propaganda presents a serious threat to society and that it undermines

> the dignity and self-worth of target group members and, more generally, contributes to disharmonious relations among various racial, cultural and religious groups, as a result eroding the tolerance and open-mindedness that must flourish in a multicultural society which is committed to the idea of equality.[62]

The majority therefore found that "[i]n seeking to prevent the harms caused by hate propaganda, the objective behind s. 13(1) is obviously one of pressing and substantial importance sufficient to warrant some limitation upon the freedom of expression."[63] The Court reiterated its findings regarding hate propaganda, the Charter and the importance of Parliament's legislative objective.

Perhaps the most well-known CHRT decision with regard to hate speech on the Internet pertained to a site maintained by Ernst Zundel, a free-speech activist who was charged on several occasions for disseminating anti-Semitic literature.[64] This 2002 decision clarified that former section 13 applied to the Internet, and it reinforced the constitutionality of section 13. Parliament subsequently amended section 13 to add that it applied to Internet communications. The decision in the Zundel case was applied in subsequent Internet hate promotion decisions made by the CHRT.[65]

One other decision worth noting is that of the Federal Court of Appeal in *Lemire v. Canada (Human Rights Commission)* in 2014. In this case, the Court examined the penalty provisions in the CHRA associated with non-compliance with former section 13. It held that those provisions were constitutional because financial penalties for non-compliance with regulatory legislation for the protection of the public are not necessarily "penal" in nature – as are the penalties in the *Criminal Code*. The Court found that the provisions in the CHRA were a "reasonable means of imposing financial accountability for the damage caused by the vilification of targeted groups and of deterring the communication of hate speech in order to decrease discrimination against them."[66]

5.3 *Whatcott* Decision

In 2013, in *Saskatchewan (Human Rights Commission) v. Whatcott*, the Supreme Court of Canada examined the constitutionality of section 14(1)(b) of the *Saskatchewan Human Rights Code*, which is similar to former section 13 of the CHRA in that it prohibits "any representation" (i.e., messages or other publications) that "exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground."[67]

The Court followed its previous decision in *Taylor* and upheld the prohibition against hatred as a reasonable limit on free expression. The Court reviewed the law concerning hate speech and the test that should be applied by courts and tribunals in such cases. It underscored that the hate speech prohibitions should be applied "objectively" by asking whether, "when considered objectively by a reasonable person aware of the relevant context and circumstances, the speech in question would be understood as exposing or tending to expose members of the target group to hatred."[68] The question is not, therefore, whether a respondent intended to expose a group to hatred, but whether a reasonable person would be aware that the respondent's statement or publication was likely to cause this.

The Court also emphasized how, due to its "tendency to silence the voice of its target group," hate speech can "distort or limit the robust and free exchange of ideas" and is therefore detrimental to the values underlying freedom of speech. However, as only speech of an "ardent and extreme" nature should be considered to meet the definition of "hatred," the Court held that the portion of section 14(1)(b) of the *Saskatchewan Human Rights Code* pertaining to speech that is belittling or affronts the dignity of a person was unconstitutional and struck it from the legislation. Among its reasons, the Court concluded that expression of this type is not sufficiently egregious to justifiably limit freedom of expression.

6 THE DEBATE REGARDING ANTI-HATE PROVISIONS IN HUMAN RIGHTS LEGISLATION

Over recent decades, Canadian courts have developed an analytical framework for determining what expression should be considered hate propaganda and therefore receive criminal sanction or be dealt with by a human rights commission and/or tribunal. While the Supreme Court has supported the constitutionality of both the criminal and human rights legislative models, some legislatures have moved away from using the human rights model to address hate speech.

Proponents of taking a less restrictive approach to free expression have tended to view the human rights law model for dealing with hate promotion as an unnecessary and excessive restriction on individual rights, while others have considered it to be a more efficient and flexible means of stopping the spread of hatred. In the period leading up to the repeal of section 13 of the CHRA, many commentators who remained generally supportive of some role for human rights complaints in dealing with the spread of hatred concurred that some reform was necessary.

Human rights cases regarding expressions of hatred were dealt with by tribunals and courts throughout the 2000s,[69] though the debate received increased attention in 2008 after the case of Canadian Islamic Congress (CIC) versus Rogers Media, in which the CIC filed a complaint with the Canadian Human Rights Commission (CHRC) pursuant to section 13 that an article written by Mark Steyn in the online edition of *Maclean's* magazine exposed members of the Muslim community to hatred and contempt.[70] The article discussed, through demographics, the argument that the "Western world" was at risk of being supplanted by the "Muslim world."[71]

The CHRC determined that

> although some aspects of the article in question were strongly worded, polemical, colourful and calculated to excite discussion, they did not meet the threshold of hate and contempt as determined by the Supreme Court in *Taylor*.[72]

As it later noted, while it had fulfilled its legislative mandate in receiving, processing and making a decision on the CIC complaint, "the mere fact that the Commission accepted the complaint in the first place subjected the Commission to criticism by many who misunderstood the Commission's role."[73] The Canadian Islamic Congress also filed complaints regarding this and other *Maclean's* articles with the Ontario Human Rights Commission and the British Columbia Human Rights Commission, which were dismissed.[74]

In 2009, McClelland & Stewart published *Shakedown: How Our Government Is Undermining Democracy in the Name of Human Rights*, a book that was critical of Canadian human rights commissions and, in particular, advocated the repeal of section 13 of the CHRA. Written by Ezra Levant, a journalist and lawyer who was required to respond to a complaint before the Alberta Human Rights Commission that he had incited hatred by republishing controversial cartoon images of the prophet Mohammed,[75] it drew considerable attention to the reform of section 13 and it appeared on national best-seller lists.[76]

To address the various concerns being raised, the CHRC published two reports in 2008 and 2009, both of which proposed a number of reforms. The first report was commissioned from Richard Moon, a university professor whose research has focused on freedom of expression. He recommended the repeal of section 13 and greater use by police and prosecutors of section 320.1 of the *Criminal Code* to prosecute hate crimes.[77] The second, the CHRC's own special report to Parliament entitled *Freedom of Expression and Freedom from Hate in the Internet Age*, considered Professor Moon's recommendation, but advocated "improvements" to section 13 rather than its repeal.[78]

During the study by the House of Commons Standing Committee on Justice and Human Rights of Bill C-304 (which repealed section 13 of the CHRA),[79] witnesses acknowledged that some reforms were necessary and also that the tenor of the debate had changed.[80] B'nai Brith, which had actively campaigned to keep section 13 in the past, supported its repeal. As Executive Vice President Frank Dimant informed the Committee:

> [S]ection 13 ... has been a tool for B'nai Brith Canada throughout its years in fighting hate speech. ... However ... as a progressive human rights organization, we recognize the misuse of this section and the hardships it has brought to individuals. Therefore, at this moment, we support the repeal of the section.
>
> We want to make it clear that we come with a heavy heart. ... [R]epeal by itself, without putting into place other safeguards, will be a disservice to the Canadian population in fighting the kind of hate-mongers who exist here.[81]

Since the repeal of section 13, an attempt to add new anti-hate provisions to human rights laws have occurred in the Quebec National Assembly. On 10 June 2015, Bill no. 59, An Act to amend various legislative provisions to better protect persons,[82] was introduced in the Quebec National Assembly. The bill was intended, among other things, to combat hate speech and speech inciting violence. While the bill was passed in the legislature, the provisions targeting hate speech were removed further to a motion that received unanimous support.[83] The motion noted that the anti-hate speech provisions had not been well received and that the National Assembly recognized the importance of free expression as fundamental in a free and democratic society.

7 CONCLUSION

Hate speech and hate crimes have become an increasing concern in recent years, highlighted by Statistics Canada data and the regular stream of items in the media focused on the rise in many countries of activist groups that adopt messages of hate against ethnic groups, religions and immigrants. These facts suggest that hatred continues to be an active force, and it seems that hatred remains a part of human fallibility that will not disappear any time soon.

Canadian courts have made it clear that reasonable limits can be placed on our freedom of expression in order to deal with hate, but they have also carefully scrutinized such limits to ensure that they are minimal and balanced with other measures that protect free expression. It is also clear that societal changes and technological developments will mean that the way our laws attempt to contain the harms caused by the spread of hatred will continue to inspire debate and the search for new solutions.

NOTES

* This publication contains some material from Julian Walker, *Canadian Anti-hate Laws and Freedom of Expression*, Publication no. 2010-31, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 March 2013.

1. United Nations General Assembly, *Universal Declaration of Human Rights*.

2. As discussed in the following examples: *R. v. Keegstra*, [1990] 3 SCR 697; Special Committee on Hate Propaganda in Canada, *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada*, Queen's Printer, Ottawa, 1966; Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the* Canadian Human Rights Act *and the Regulation of Hate Speech on the Internet*, Report commissioned by the Canadian Human Rights Commission, October 2008; and House of Commons, Standing Committee on Justice and Human Rights [JUST], *Evidence*, 1st Session, 41st Parliament, 24 April 2012, 1210 (Mark Toews, Canadian Bar Association).

3. For more information concerning American law pertaining to hate speech, see, for example, United States, Congressional Research Service, Library of Congress, "Group Libel, Hate Speech," in "First Amendment: Religion and Free Expression," *Constitution of the United States of America: Analysis and Interpretation*, Senate Document No. 112-9, 112th Congress, 2017, pp. 1297–1299; and William B. Fisch, "Hate Speech in the Constitutional Law of the United States," *American Journal of Comparative Law*, Vol. 50 (Supplement), Fall 2002.

4. *Brandenburg v. Ohio*, 395 U.S. 444, para. 447 (1969).

5. *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

6. European Union, "Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law," *Official Journal of the European Union*, L 328/55, 6.12.2008. A European Commission report found in 2014 that most EU member states had not yet correctly implemented the rules designed to tackle racist and xenophobic hate crimes: European Commission, *Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law*, COM/2014/027, 27 January 2014.

7. For a list of countries that outlaw apostasy and blasphemy, see, for example, Angelina E. Theodorou, "Which countries still outlaw apostasy and blasphemy?," *Facttank: News in the Numbers*, Pew Research Centre, 29 July 2016.

8. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

9. *Criminal Code*, R.S.C., 1985, c. C-46.

10. *Re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 S.C.R. 1123. Justice Lamer noted 25 offences in the *Criminal Code* that place some kind of restriction on expression.

11. *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

12. Bill C-13, An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, 2nd Session, 41st Parliament (S.C. 2014, c. 31).

13. See British Columbia, *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 7; *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 3; *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 14; and Northwest Territories, *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 13.

14. See British Columbia, *Human Rights Code*, s. 7; *Alberta Human Rights Act*, s. 3; *The Saskatchewan Human Rights Code*, s. 14; Manitoba, *The Human Rights Code*, C.C.S.M. c. H175, s. 18; Ontario, *Human Rights Code*, R.S.O. 1990, c. H.19, s. 13; Quebec, *Charter of Human Rights and Freedoms*, C.Q.L.R., c. C-12, ss. 10 and 11; New Brunswick, *Human Rights Act*, R.S.N.B. 2011, c. 171, s. 7; Nova Scotia, *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 7; Prince Edward Island, *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 12; Newfoundland and Labrador, *Human Rights Code*, R.S.N.L. 1990, c. H-14, s. 14; Nunavut, *Human Rights Act*, S. Nu. 2003, c. 12, s. 14; and Northwest Territories, *Human Rights Act*, s. 13.

15. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11.

16. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 SCR 892.

17. Section 52(1) of the *Constitution Act, 1982* expressly states, "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

18. Peter Hogg, *Constitutional Law of Canada*, 5th ed., Thomson Carswell, Toronto, 2007, pp. 43-7–43-10.

19. *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 1(d).

20. See *Hogan v. R.*, [1975] 2 SCR 574. Other cases have also held human rights laws to be quasi-constitutional: see *Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145; and *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 SCR 321.

21. Individuals or groups whose Charter rights have been infringed may apply for a remedy under section 24(1). The section is extremely expansive in its application, permitting courts to award individualized forms of remedy that are "appropriate and just" in the circumstances. In contrast, although human rights tribunals generally have broad remedial powers, they are limited to making orders that are provided for in their governing legislation.

22. In some cases, the courts have given the government time to rectify any part of a law that is unconstitutional before the decision that a law is to be struck down takes effect.

23. *Canada Elections Act*, S.C. 2000, c. 9, s. 328.

24. There have been many proposals to amend the hate propaganda provisions since their inception, though Parliament has rarely changed them. It did so when it adopted the *Anti-terrorism Act*, S.C. 2001, c. 41, whose section 10 amended the *Criminal Code* by adding section 320.1, dealing with hate material found on computers and the seizure of such material. It also expanded the definition of "identifiable group" in the following bills: Bill C-250, An Act to amend the Criminal Code (hate propaganda), 3rd Session, 37th Parliament (S.C. 2004, c. 14); Bill C-13, An Act to amend the Criminal Code, the Canada Evidence Act, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, 2nd Session, 41st Parliament (S.C. 2014, c. 31); and Bill C-16, An Act to amend the Canadian Human Rights Act and the Criminal Code, 1st Session, 42nd Parliament (S.C. 2017, c. 13).

25. Special Committee on Hate Propaganda in Canada (1966).

26. For a description of the events in the 1960s leading up to the adoption by Parliament of the hate propaganda provisions found in the *Criminal Code*, see William Kaplan, "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda," in *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen*, ed. William Kaplan and Donald McRae, McGill-Queen's University Press, Montréal and Kingston, 1993.

27. Special Committee on Hate Propaganda in Canada (1966), p. 61.

28. In addition to the specific hate crimes found in these sections, pursuant to section 718.2(a)(i) of the *Criminal Code*, hate is an aggravating circumstance in sentencing for any type of criminal offence. This is discussed in section 3.1.3 of this paper.

29. Key precedents include *R. v. Buzzanga and Durocher*, 1979 CanLII 1027 (ON CA); *R. v. Keegstra*; *R. v. Harding*, 2001 CanLII 21272 (ON CA); *R. v. Krymowski*, 2005 SCC 7; and *Mugasera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40.

30. *Mugasera v. Canada (Minister of Citizenship and Immigration)*.

31. This list has been expanded upon in recent years through legislative amendments. See note 24.

32. Section 2 of the *Criminal Code* contains a detailed definition of Attorney General, which includes an explanation that the term means "either the Attorney General of Canada or the Attorney General or Solicitor General of the province in which those proceedings are taken and includes the lawful deputy of any of them."

33. Clause 7 of Bill C-46, An Act to amend the Criminal Code, the Competition Act and the Mutual Legal Assistance in Criminal Matters Act, 2nd Session, 40th Parliament, would have amended section 319(7) of the *Criminal Code* to state that "'communicating' means communicating by any means and includes making available." The term "communicating" would have been very broad and would have included all types of communication. Also, a person who made such communications available to others could have been charged under such a provision. An example of this type of communication is the re-publishing of an article in a magazine or the re-posting of hate messages on the Internet. Introduced in the House of Commons in June 2009 by the Minister of Justice, Bill C-46 died on the *Order Paper* the same year.

34. *R. v. Keegstra*.

35. *R. v. Harding*. See also *R. v. Buzzanga and Durocher*.

36. *R. v. Keegstra*.

37. Bill C-51, An Act to enact the Security of Canada Information Sharing Act and the Secure Air Travel Act, to amend the Criminal Code, the Canadian Security Intelligence Service Act and the Immigration and Refugee Protection Act and to make related and consequential amendments to other Acts, 2nd Session, 41st Parliament.

38. Bill C-16.

39. Maxime Gaudet, *Police-reported hate crime in Canada, 2016*, Statistics Canada, 25 April 2018.

40. Ibid.

41. This section was most recently amended by Bill C-305, An Act to amend the Criminal Code (mischief), 1st Session, 42nd Parliament (S.C. 2017, c. 23).

42. *Broadcasting Distribution Regulations*, SOR/97-555.

43. *Broadcasting Act*, S.C. 1991, c. 11. See also *Radio Regulations, 1986*, SOR/86-982, s. 3; *Television Broadcasting Regulations, 1987*, SOR/87-49, s. 5; and *Discretionary Services Regulations*, SOR/2017-159, s. 3.

44. For further details, see Canada Border Services Agency, *Canada Border Services Agency's Policy on the Classification of Hate Propaganda, Sedition and Treason*, Memorandum D9-1-15, 12 July 2017; and Canada Border Services Agency, *Canada Border Services Agency's Determination Procedures for Obscenity and Hate Propaganda*, Memorandum D9-1-17, 20 June 2017. See also *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.); and *Customs Tariff*, "Schedule," Chapter 98, Tariff Item 9899.00.00, p. 98-15.

45. Under section 92 of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), provinces may pass laws under such heads of power as "Property and Civil Rights," "Shop, Saloon, Tavern, Auctioneer, and other Licences" and "Generally all Matters of a merely local or private Nature in the Province." These powers allow a province to pass human rights laws concerning all matters involved in the provision of services, employment and accommodation within the province. Such laws therefore govern, to name a few, provincially registered or incorporated businesses; landlords; provincial government officials, agencies or other organizations; employers; and service providers in general.

    Under section 91, federal laws may apply to the "Regulation of Trade and Commerce," or generally promote "Peace, Order, and good Government." The jurisdiction of the *Canadian Human Rights Act* therefore covers employment, accommodation and services provided by the federal government and extends to federally regulated corporations and other persons or institutions under federal regulation.

46. For more information on this topic, see Luke McNamara, "Negotiating the contours of unlawful hate speech: regulation under provincial Human Rights Laws in Canada," University of Wollongong Australia, 2005 (originally published in *University of British Columbia Law Review*, Vol. 38, No. 1, 2005).

47. Other laws relating to human rights matters, to a greater or lesser degree, include the *Employment Equity Act*, S.C. 1995, c. 44; and the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

48. Federally regulated businesses include federal departments, agencies and Crown corporations; Canada Post; chartered banks; national airlines; interprovincial communications and telephone companies; interprovincial transportation companies; and other federally regulated industries, such as certain mining operations.

49. Yukon, *Human Rights Act*, R.S.Y. 2002, c. 116.

50. See note 14.

51. See, for example, *Ontario Racial Discrimination Act, 1944*, S.O. 1944, c. 51.

52. Ontario Human Rights Commission, *Submission to the Canadian Human Rights Commission concerning section 13 of the Canadian Human Rights Act and the regulation of hate speech on the internet by Richard Moon October 2008*, January 2009.

53. See British Columbia, *Human Rights Code*, s. 7; *Alberta Human Rights Act*, s. 3; *The Saskatchewan Human Rights Code*, s. 14; and Northwest Territories, *Human Rights Act*, s. 13.

54. *Boissoin v. Lund*, 2009 ABQB 592; and *Whatcott v. Saskatchewan (Human Rights Tribunal)*, 2010 SKCA 26 [appeal allowed in part, *Saskatchewan (Human Rights Commission) v. Whatcott*].

55. Examples of cases that have examined issues related to Canadian anti-discrimination and anti-hate promotion provisions are *Saskatchewan (Human Rights Commission) v. Engineering Students' Society* (1989), 10 CHRR D/5636 (Sask. Bd. Inq.); *Warren v. Manitoba Human Rights Commission* (1985), 6 CHRR D/2777 (Manitoba C.A.), as cited in *Whiteley v. Osprey Media Publishing*, 2010 HRTO 2152 (Human Rights Tribunal of Ontario); *Owens v. Saskatchewan (Human Rights Commission)*, [2006] SJ No. 221 (C.A.); *Saskatchewan (Human Rights Commission) v. Bell*, 1994 CanLII 4699 (SK CA); *Re: Kane*, [2001] AJ No. 915 (Q.B.); *Stacey v. Campbell et al.*, 2002 BCHRT 35; *Balcilek v. Kwantlen Polytechnic University*, [2009] BCHRT No. 366; and *Recalma v. Orca Sand & Gravel LP*, 2010 BCHRT 335.

56. For more on the history of section 13, see Moon (2008), pp. 3–19; Elisabeth Symons, "Bill C-36, Hate, the Internet, and Internet Service Providers," *Information and Technology: Recent Developments for Professionals*, Vol. 6, May 2002, pp. 10–11; and, more generally, Jane Bailey, "Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda," *McGill Law Journal*, Vol. 49, 2004.

57. House of Commons, Motion M-446, *Notice Paper*, No. 41, 2nd Session, 39th Parliament, 31 January 2008 (introduced by Keith Martin, Esquimalt–Juan de Fuca).

58. Bill C-304, An Act to amend the Canadian Human Rights Act (protecting freedom), 1st Session, 41st Parliament (S.C. 2013, c. 37).

59. *R. v. Keegstra*.

60. Ibid.

61. Ibid.

62. *Canada (Human Rights Commission) v. Taylor*.

63. Ibid.

64. *Citron and Toronto Mayor's Committee v. Zundel*, Canadian Human Rights Tribunal, TD 1/02, 18 January 2002.

65. Tribunal decisions, and court decisions referencing them, include *Warman v. Winnicki*, 2006 CHRT 20; *Canada (Canadian Human Rights Commission) v. Winnicki*, 2006 FC 873; *Canada (Human Rights Commission) v. Winnicki*, 2005 FC 1493; *Warman v. Tremaine*, 2007 CHRT 2; and *Tremaine v. Warman*, 2008 FC 1032.

66. *Lemire v. Canada (Human Rights Commission)*, 2014 FCA 18, para. 104.

67. *The Saskatchewan Human Rights Code*, s. 14(1).

68. *Saskatchewan (Human Rights Commission) v. Whatcott*, para. 35, citing *Owens v. Saskatchewan (Human Rights Commission)*, 2002 SKQB 506.

69. For example: *Warman v. Winnicki*; *Canada (Human Rights Commission) v. Winnicki*; *Warman v. Tremaine*; and *Kulbashian v. Canada (Canadian Human Rights Commission)*, 2007 FC 354.

70. Canadian Human Rights Commission, *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age*, June 2009, p. 1. For the decision, see "Decision of the Commission: Canadian Islamic Congress v. Rogers Media Inc. (20071008)."

71. Mark Steyn, "The future belongs to Islam," *Maclean's*, 20 October 2006.

72. Canadian Human Rights Commission (2009), p. 31.

73. Ibid.

74. Ontario Human Rights Commission, "Commission statement concerning issues raised by complaints against Maclean's Magazine," 9 April 2008; and *Elmasry and Habib v. Roger's Publishing and MacQueen (No. 4)*, 2008 BCHRT 378.

75. The introduction to this book is by the aforementioned Mark Steyn.

76. See, for example, the bestseller lists in the following editions: *Maclean's*, 14 July 2009; *Globe and Mail* [Toronto], 15 May 2009; and *Financial Post*, 18 April 2009. *Shakedown: How Our Government Is Undermining Democracy in the Name of Human Rights* received both positive and critical reviews. See, for example, Mark Medley, "Book Review," *National Post* [Toronto], 11 April 2009; Rex Murphy, "The right to offend the easily offended," *Globe and Mail* [Toronto], 28 March 2009 (updated 27 March 2017); Andrew Coyne, "Human rights racket," *Maclean's*, 2 April 2009; Robert Meynell, "Review: Shakedown – How Our Government Is Undermining Democracy in the Name of Human Rights," *Quill & Quire*, May 2009; Franklin Bialystok, "The Nazi threat in the '60s in Canada was real," *Ottawa Citizen*, 11 June 2009; Mark J. Freiman, "Trial by Anecdote: A controversial polemicist takes on Canada's commitment to human rights," *Literary Review of Canada*, June 2009; and James W. St. G. Walker, "Book Review," *Human Rights Quarterly*, Vol. 32, No. 1, February 2010.

77. Moon (2008), pp. 2–3.

78. Canadian Human Rights Commission (2009), p. 3.

79. JUST, *10th Report*, 1st Session, 41st Parliament, 26 April 2012. The Committee heard from Ezra Levant and Mark Steyn on 5 October 2009 and from Jennifer Lynch, Chief Commissioner of the Canadian Human Rights Commission, on 26 October 2009. See JUST, *Evidence*, 2nd Session, 40th Parliament, 5 October 2009; and JUST, *Evidence*, 2nd Session, 40th Parliament, 26 October 2009.

80. JUST (2012) (Boews). One reform suggested was the repeal of the penalties in section 54 of the *Canadian Human Rights Act* due to their inconsistency "with the core remedial functions of human rights legislation."

81. **JUST**, *Evidence*, **1st Session, 41st Parliament, 26 April 2012, 1105 (Frank Dimant, Executive Vice-President, B'nai Brith Canada).**

82. **Quebec National Assembly,** Bill n° 59 : An Act to amend various legislative provisions to better protect persons (modified title).

83. **Quebec National Assembly,** *Procès-verbal de l'Assemblée*, **No. 176, 25 May 2016, pp. 2322–2324.**

APPENDIX – PROVISIONS IN THE *CRIMINAL CODE* DEALING WITH THE PROMOTION OF HATE: SECTIONS 318 TO 320.1

HATE PROPAGANDA

Advocating genocide	**318.**(1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.
Definition of "genocide"	(2) In this section, "genocide" means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely, (a) killing members of the group; or (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.
Consent	(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.
Definition of "identifiable group"	(4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.
Public incitement of hatred	**319.**(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.
Wilful promotion of hatred	(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.
Defences	(3) No person shall be convicted of an offence under subsection (2) (a) if he establishes that the statements communicated were true; (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Forfeiture	(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.
Exemption from seizure of communication facilities	(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.
Consent	(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.
Definitions	(7) In this section,
"communicating"	"communicating" includes communicating by telephone, broadcasting or other audible or visible means;
"identifiable group"	"identifiable group" has the same meaning as in section 318;
"public place"	"public place" includes any place to which the public have access as of right or by invitation, express or implied;
"statements"	"statements" includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations.
Warrant of seizure	320.(1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda shall issue a warrant under his hand authorizing seizure of the copies.
Summons to occupier	(2) Within seven days of the issue of a warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.
Owner and author may appear	(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.
Order of forfeiture	(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.
Disposal of matter	(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

Appeal	(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings (a) on any ground of appeal that involves a question of law alone, (b) on any ground of appeal that involves a question of fact alone, or (c) on any ground of appeal that involves a question of mixed law and fact, as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.
Consent	(7) No proceeding under this section shall be instituted without the consent of the Attorney General.
Definitions	(8) In this section,
"court"	"court" means (a) in the Province of Quebec, the Court of Quebec, (a.1) in the Province of Ontario, the Superior Court of Justice, (b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench, (c) in the Provinces of Prince Edward Island and Newfoundland, the Supreme Court, Trial Division, (c.1) [Repealed, 1992, c. 51, s. 36] (d) in the Provinces of Nova Scotia and British Columbia, in Yukon and in the Northwest Territories, the Supreme Court, and (e) in Nunavut, the Nunavut Court of Justice;
"genocide"	"genocide" has the same meaning as in section 318;
"hate propaganda"	"hate propaganda" means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319;
"judge"	"judge" means a judge of a court.
Warrant of seizure	320.1(1) If a judge is satisfied by information on oath that there are reasonable grounds for believing that there is material that is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, that is stored on and made available to the public through a computer system within the meaning of subsection 342.1(2) that is within the jurisdiction of the court, the judge may order the custodian of the computer system to (a) give an electronic copy of the material to the court; (b) ensure that the material is no longer stored on and made available through the computer system; and (c) provide the information necessary to identify and locate the person who posted the material.

Notice to person who posted the material	(2) Within a reasonable time after receiving the information referred to in paragraph (1)(c), the judge shall cause notice to be given to the person who posted the material, giving that person the opportunity to appear and be represented before the court and show cause why the material should not be deleted. If the person cannot be identified or located or does not reside in Canada, the judge may order the custodian of the computer system to post the text of the notice at the location where the material was previously stored and made available, until the time set for the appearance.
Person who posted the material may appear	(3) The person who posted the material may appear and be represented in the proceedings in order to oppose the making of an order under subsection (5).
Non-appearance	(4) If the person who posted the material does not appear for the proceedings, the court may proceed *ex parte* to hear and determine the proceedings in the absence of the person as fully and effectually as if the person had appeared.
Order	(5) If the court is satisfied, on a balance of probabilities, that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, it may order the custodian of the computer system to delete the material.
Destruction of copy	(6) When the court makes the order for the deletion of the material, it may order the destruction of the electronic copy in the court's possession.
Return of material	(7) If the court is not satisfied that the material is available to the public and is hate propaganda within the meaning of subsection 320(8) or data within the meaning of subsection 342.1(2) that makes hate propaganda available, the court shall order that the electronic copy be returned to the custodian and terminate the order under paragraph (1)(b).
Other provisions to apply	(8) Subsections 320(6) to (8) apply, with any modifications that the circumstances require, to this section.
When order takes effect	(9) No order made under subsections (5) to (7) takes effect until the time for final appeal has expired.